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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D.C. 20505

Legislative Counsel

OLC 81-0186/c

25 FEB 1981

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to your requests for the views of the Central Intelligence Agency on H.R. 4 and S. 391, the "Intelligence Identities Protection Act."

The Central Intelligence Agency's support for legislation to provide criminal penalties for the unauthorized disclosure of information identifying certain individuals engaged or assisting in U.S. foreign intelligence activities is, of course, well known. Former Deputy Director of Central Intelligence Frank C. Carlucci testified at length on the need for identities legislation before the Senate Select Committee on Intelligence (24 June 1980). Mr. Carlucci also testified before the Senate Judiciary Committee (5 September 1980), and before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence (30 June 1980). In addition, Agency witnesses appeared at a hearing held by the House Judiciary Subcommittee on Civil and Constitutional Rights (19 August 1980).

The Central Intelligence Agency continues to believe that passage of an Intelligence Identities Protection Act is essential to the maintenance of a strong and effective intelligence apparatus. Enactment of this legislation is an important component of the Administration's effort to implement the President's expressed determination to enhance the nation's intelligence capabilities.

H.R. 4 is identical to H.R. 5615 of the 96th Congress as reported by the House Intelligence and Judiciary Committees. S. 391 is identical to S. 2216 as reported during the 96th Congress by the Senate Select Committee on Intelligence. H.R. 4 and S. 391 are essentially similar. Both are carefully and narrowly crafted Bills which could effectively remedy the problems posed by unauthorized disclosures of intelligence identities, and withstand challenge on constitutional grounds. Thus, the Central Intelligence Agency would support enactment of either H.R. 4 or S. 391.

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The Bills do differ with respect to the standard of proof that would be required with respect to the subsection which would apply to individuals who have not had authorized access to classified information, and which would criminalize their disclosures of identities even if these disclosures cannot be shown to have come from classified sources. This has been the most controversial part of identities legislation, and it is also the key provision from the standpoint of the legislation's potential effectiveness in deterring unauthorized disclosures. We have concluded that the objective standard of proof contained in S. 391 (i.e., "reason to believe that such activities would impair or impede...") is preferable to the subjective standard set forth in H.R. 4 (i.e., "with the intent to impair or impede..."). This preference is based upon a number of factors, including prospects for successful prosecutions under the differing formulations. We have discussed this matter at great length with the Department of Justice, and we believe that our preference for S. 391 is in accord with the Department's views.

Thus, we believe that the Administration should express support for S. 391. We urge, however, that this be done without prejudice to H.R. 4. The inherent unpredictability of the legislative process raises the possibility that identities legislation emerging from a House-Senate Conference could more closely approximate the House Bill. We believe that the Administration should be extremely careful not to allow a preference for the Senate formulation to call into question the ability of H.R. 4 to withstand a court test should this version ultimately be enacted.

Sincerely,

SIGNED

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Acting Legislative Counsel

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